Office-Supreme Court, U.S.
FILED
MAY 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1531

In the Supreme Court of the United States

OCTOBER TERM, 1982

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
CHARLES E. BROOKHART
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the lower courts' enforcement of a grand jury subpoena issued to petitioner was proper despite petitioner's claim that compliance with the subpoena would subject it to criminal prosecution for violation of the bank secrecy law of the Commonwealth of the Bahamas.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 ..... 5, 6

Blair v. *United States*, 250 U.S. 273 ..... 12, 16, 17

Bonner v. *City of Prichard*, 661 F.2d 1206 3

Branzburg v. *Hayes*, 408 U.S. 665 ..... 6, 12

CAB v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 8

Chase Manhattan Bank, Application of, 297 F.2d 611 10

Chicago & Southern Airlines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 5

Grand Jury Investigation (McLean), In re, 565 F.2d 318 13

Grand Jury Proceedings (Universal Mfg. Co.), In re, 508 F.2d 684 13

Page

Cases—Continued:

Grand Jury Proceedings (Field), In re, 532 F.2d 404, cert. denied, 429 U.S. 940 ..... 3, 10, 11, 12

Grand Jury Proceedings (Hergenroeder), In re, 555 F.2d 686 13

Grand Jury Proceedings (Schofield I), In re, 486 F.2d 85 ..... 12, 13, 14

Grand Jury Proceedings (Schofield II), In re, 507 F.2d 963, cert. denied, 421 U.S. 1015 15

Grand Jury Subpoena Duces Tecum, In re, 697 F.2d 277 13

Hamling v. *United States,* 418 U.S. 87 14

Ings v. *Ferguson,* 282 F.2d 149 10

Liberatore, In re, 574 F.2d 78 ..... 13, 15

Pantojas, In re, 628 F.2d 701 13

Piemonte v. *United States,* 367 U.S. 556 ..... 16, 17

SEC v. *Minas de Artemisa,* 150 F.2d 215 8

Societe Internationale Pour Participations Industrielles v. *Rogers,* 357 U.S. 197 ..... 5, 6, 7, 8

Special Grand Jury No. 81-1, In re, 676 F.2d 1005, withdrawn, 697 F.2d 112 13

The Schooner Exchanger v. *McFaddon,* 11 U.S. (7 Cranch.) 116 5

Page

Cases—Continued:

Tournier v. *National Provincial & Union Bank of England*, [1924] 1 K.B. 461 8

United States v. *Calandra*, 414 U.S. 338 ..... 6, 8, 12, 15, 16, 17

United States v. *Dionisio*, 410 U.S. 1 ..... 12, 14, 15, 16

United States v. *First National Bank*, 699 F.2d 341 ..... 9-10, 11

United States v. *First National City Bank*, 379 U.S. 378 ..... 6, 9

United States v. *First National City Bank*, 396 F.2d 897 ..... 10, 13

United States v. *Lovasco*, 431 U.S. 783 6

United States v. *Mara*, 410 U.S. 19 ..... 12, 15

United States v. *Powell*, 379 U.S. 48 11

United States v. *Stone*, 429 F.2d 138 12

United States v. *Vetco, Inc.*, 644 F.2d 1324, cert. denied, 454 U.S. 1098 ..... 7, 10, 12, 15

Upjohn Co. v. *United States*, 449 U.S. 383 16

Westinghouse Electric Corp. Uranium Litigation, In re, 563 F.2d 992 10

Constitution ~~and statute:~~

U. S. Const. Amend. IV 13

Miscellaneous:

Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1531

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 691 F.2d 1384. The opinions and order of the district court (Pet. App. 1b-8b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1982 (Pet. App. 1c). A petition for rehearing was denied on January 6, 1983 (Pet. App. 1d-3d). The petition for a writ of certiorari was filed on March 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges an order of the United States District Court for the Southern District of Florida holding it in civil contempt for failing to comply with a prior order of the

court enforcing a federal grand jury subpoena. The Commonwealth of the Bahamas has filed a brief as *amicus curiae* in support of the petition.

On September 23, 1981, a federal grand jury conducting a tax and narcotics investigation in the Southern District of Florida issued a subpoena duces tecum to petitioner for the production of certain records maintained at petitioner's main branch or any of its branch offices in Nassau, Bahamas, and Antigua, Lesser Antilles,[1] relating to bank accounts of Robert Twist, Sr., Lesser Antilles Trading Company, Ltd., and/or Latco Development Corporation d/b/a Ambassador Jet International, Inc., for the period January 1, 1975 through and including September 30, 1981 (Pet. App. 2a; 1b; R. 3-4, 23-24; Jan. 1982 Tr. 4).[2] The subpoena was served on petitioner at its Miami, Florida, office (Pet. App. 2a).[3] Asserting that compliance with the subpoena would violate the bank secrecy law of the Commonwealth of the Bahamas, petitioner refused to produce the subpoenaed documents (*ibid.*).

---

[1]Petitioner advised the district court that there are no documents responsive to the subpoena at the Antigua branch (Pet. 3 n.1; Pet. App. 2a n.1), and thus that aspect of the subpoena is not at issue.

[2]"R." refers to the original record on appeal. "Jan. 1982 Tr." refers to the reporter's transcript of proceedings on January 13, 1982, and "July 1982 Tr." refers to the reporter's transcript of proceedings on July 6, 1982. The transcripts are contained in volume two of the record on appeal. "Bah. Br." refers to the brief as *amicus curiae* filed in support of the petition by the Commonwealth of the Bahamas.

[3]Petitioner is chartered in Canada and has branches in numerous countries, including the United States and the Bahamas (Pet. 2-3). Petitioner's Bahamian branch and its Miami, Florida, office are both parts of a single corporate entity (July 1982 Tr. 25).

Kim David Taylor, who is in charge of the Miami office (July 1982 Tr. 13), testified at a contempt hearing on July 6, 1982, that his office had on occasion opened accounts in the Bahamas for customers and that customers could make deposits to Bahamian accounts at his office

On June 11, 1982, the district court granted the government's motion to compel petitioner to comply with the subpoena (Pet. App. 1b-4b). In its order, the district court found (*id.* at 2b) that "compliance with the subpoena may cause the Bank of Nova Scotia to be subject to criminal charges" and therefore applied the balancing test adopted by the Fifth Circuit for such situations in *In re Grand Jury Proceedings (Field),* 532 F.2d 404 (1976), cert. denied, 429 U.S. 940 (1976).[4] In considering the factors set forth in Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965) (hereinafter "Restatement"), the court concluded: (1) that the interest of the United States in furthering the investigatory function of the grand jury outweighed the Bahamian interest in secrecy (Pet. App. 3b); (2) that while there was a potential for hardship to the bank, the court could not find with certainty whether the hardship would be actual or merely theoretical and that petitioner had not made a good faith effort to comply with the subpoena by seeking the consent of its customer, a Bahamian court order, or a waiver from the Bahamian government (*id.* at 3b-4b); (3) that it was significant that actual disclosure pursuant to the subpoena would occur in the United States, not the Bahamas (*id.* at 4b); and (4) that enforcement of the subpoena would help to

---

(July 1982 Tr. 20). He claimed, however, that customers had to communicate directly with the Bahamian branch to make withdrawals or obtain information as to the status of their accounts (July 1982 Tr. 20-21). This claim conflicted with information obtained from petitioner by Internal Revenue Service (IRS) Special Agent Albert J. Monica. On January 12, 1982, he spoke by telephone with a Bill Armstrong at petitioner's main office in Toronto, Canada, and was told that all banking transactions for accounts in the Bahamas could be handled by the Miami office (R. 120).

[4]Decisions of the Fifth Circuit handed down prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc).

insure compliance with the grand jury's goals of investigating criminal matters (*ibid.*).

Petitioner refused to comply with the enforcement order, and on July 10, 1982, the district court issued an order holding petitioner in contempt and imposing a penalty of $500 per day (Pet. App. 7b-8b). Petitioner appealed, and the court of appeals affirmed (Pet. App. 1a-13a). The court of appeals rejected petitioner's contentions that the government was required to make a showing as to the relevance of the documents sought (Pet. App. 5a-6a), that enforcement of the subpoena would impinge upon the political prerogatives of the government in the area of foreign relations (*id.* at 6a-7a), that imposing sanctions upon petitioner violated due process because petitioner was a "mere stakeholder" (*id.* at 7a-8a), and that the district court improperly analyzed this case under the Restatement's balancing test (*id.* at 9a-12a). The court of appeals also determined that requiring the government to apply to the Bahamian courts for judicial assistance would not be substantially equivalent to use of a grand jury subpoena (*id.* at 11a-12a). The court pointed out that an affidavit of Peter D. Graham (*id.* at 1h-4h), a member of the Bahamas Bar, stated that the Supreme Court of the Bahamas would not order disclosure of bank records if the subject of an investigation is a crime only under the tax laws of the United States. The court also noted (*id.* at 11a n.8) that petitioner conceded at oral argument that the documents could not be obtained through the judicial assistance procedure if the grand jury is conducting a tax investigation. Thus, the court concluded (*id.* at 11a; footnote omitted), "it is not clear to any degree of certainty that the Bahamian court would order disclosure of all the requested documents."

ARGUMENT

Petitioner contends (Pet. 4) that the decision below conflicts with principles enunciated by this Court and other

courts of appeals. As we demonstrate below, there is no conflict with any decision of this Court, and the courts of appeals are in basic agreement on the appropriate analytic framework to employ in cases of this sort. To the extent a conflict exists at all, it involves only a relatively minor procedural issue that does not require this Court's resolution. Review in this case, where the grand jury has been denied petitioner's evidence since September 1981 and is faced with the imminent running of the statute of limitations as to some aspects of its investigation, would be especially inappropriate.

1. Petitioner contends (Pet. 6-8) that the decision of the court of appeals conflicts with this Court's decisions applying the act of state doctrine (see, *e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964))[5] and its decisions

---

[5]The Bahamas argues (Bah. Br. 4) that the decision of the court of appeals defies the principles that " 'the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute,' " quoting *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch.) 116, 136 (1812), and that a country cannot extend its enforcement jurisdiction beyond its own territory into another sovereign nation. These principles are inapplicable to this case. The subpoena in issue was served on an office of the petitioner in this country and sought records related to a citizen of this country, and production pursuant to the subpoena would take place in this country. Thus, the government of the United States did not attempt to exercise jurisdiction outside its own territory.

The Bahamas also argues (Bah. Br. 5-9) that the decision below may have an adverse affect on diplomatic relations between the United States and other countries. But, as the Bahamas acknowledges (Bah. Br. 9), this Court has recognized that the judiciary has " 'neither the aptitude, facilities, nor responsibility,' " quoting *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), to conduct foreign affairs and that these matters rest with the Executive Branch. Where, as here, the Executive Branch has expressed no concern and is itself seeking to enforce the subpoena, judicial resolution cannot turn on notions of foreign policy. See *United States* v. *First National City Bank*, 379 U.S. 378, 384-385 (1965).

in *Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197 (1958), and *United States* v. *First National City Bank*, 379 U.S. 378 (1965). Petitioner's contentions lack merit.

a. Petitioner did not claim below that the act of state doctrine precluded enforcement of the instant subpoena, thus depriving the district court and the court of appeals of the opportunity to consider any application the doctrine might have in this case. Absent exceptional circumstances not present here, this Court will not review arguments not presented to the lower courts. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the doctrine was plainly inapplicable because the courts below did not sit in judgment on any acts of the government of the Bahamas done within its own territory. See *Sabbatino*, *supra*, 376 U.S. at 416.[6]

b. Nor does enforcement of the subpoena pose any conflict with *Societe Internationale* or *First National City Bank*. In *Societe Internationale*, a Swiss holding company was seeking to recover assets that had been seized by the Alien Property Custodian under the Trading with the Enemy Act. This Court held that the district court had properly ordered production of Swiss records pursuant to the government's discovery request, despite the plaintiff/-Swiss-holding-company's claim that Swiss law limited its

---

[6]Petitioner also argues (Pet. 6) that enforcement of the instant subpoena offends the principle that a court of the United States will not enforce acts of a foreign government that take effect in this country, if those acts are inconsistent with the laws or public policy of this country. But it is refusal to enforce the subpoena that would offend this principle, for such refusal would, in effect, enforce the Bahamian law in this country at the expense of the grand jury's ability to carry out its functions. Given the importance of the grand jury's role (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 342-345 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702 (1972)), such a result would be clearly contrary to the public policy of the United States.

ability to satisfy the production order because those producing the records would have been exposed to possible criminal sanctions under Swiss law (357 U.S. at 204-206). Petitioner relies (Pet. 7) on the Court's further holding that dismissal of the holding company's complaint was not an appropriate sanction for failure to comply with the discovery request in light of the fact that the holding company had unquestionably made good faith efforts to comply with the production order and because the holding company had certain constitutionally protected rights to maintain the suit (357 U.S. at 208-213). But the Court made it clear that the district court had discretion to impose lesser sanctions (357 U.S. at 213).[7] Accordingly, as recognized in *United States* v. *Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir.), cert. denied, 454 U.S. 1098 (1981), *Societe Internationale* "did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign laws."

In the instant case, unlike *Societe Internationale,* there has been no alleged taking of petitioner's property. Nor has petitioner demonstrated a genuine risk that compliance with the subpoena would subject it to criminal sanctions. As the court of appeals stated (Pet. App. 8a), the Bahamian government has not acted to prevent petitioner from complying with the subpoena. Compare *Societe Internationale, supra,* 357 U.S. at 200-201.[8] Moreover, the district court

---

[7]For example, the Court recognized that in the absence of complete disclosure, the district court might be justified in drawing inferences adverse to the holding company as to particular events (357 U.S. at 213).

[8]The court of appeals, for purposes of its opinion, assumed that Bahamian law prohibited disclosure of the subpoenaed records (Pet. App. 4a n.2). We note, however, that Section 10(2)(a) of the Bahamian bank secrecy law (Pet. App. 2g) expressly preserves the common law relationship between a bank and its customers. Thus, petitioner is authorized to comply with the subpoena because, at common law, a

expressly found (Pet. App. 4b) that petitioner has *not* made a good faith effort to comply with the subpoena. As of the date of the order enforcing the subpoena, petitioner had made no showing that it had attempted to obtain its customer's consent to disclosure,[9] the record discloses no efforts by petitioner to consult the Bahamian government regarding disclosure (compare *Societe Internationale, supra,* 357 U.S. at 200-203), and petitioner has never applied for an order of a Bahamian court authorizing disclosure.[10] Thus, petitioner's situation is significantly different from that of the plaintiff in *Societe Internationale.*[11]

---

banker may disclose banking information where the banker is compelled by law to do so, where there is a duty to the public to disclose, where the interests of the bank require disclosure, or where the customer expressly or impliedly consents. *Tournier* v. *National Provincial & Union Bank of England,* [1924] 1 K.B. 461, 473. Here, the first three grounds for disclosure apply. A court of competent jurisdiction has ordered disclosure. The bank has a public duty to disclose under the principle that the public has a right to every man's evidence. *United States* v. *Calandra,* 414 U.S. 338, 345 (1974). And the bank has an obvious interest in avoiding contempt penalties.

[9]At the contempt hearing, however, it represented that the customer's consent had been sought and denied (July 1982 Tr. 19).

[10]Petitioner insists (Pet. 3) that it has no standing under Bahamian law to apply for such an order, but the provision of the bank secrecy law under which petitioner claims the government may apply for an order (Section 10(1)(e)(iii), reprinted at Pet. App. 2g), says nothing as to who may make an application. The Graham affidavit (Pet. App. 3h), on which petitioner bases its claim, cites no authority for the assertion that there is no procedure for an application by petitioner for an order. Thus, the record discloses no reason why petitioner could not apply for an order authorizing its compliance with the subpoena.

[11]The Commonwealth of the Bahamas asserts (Bah. Br. 11) that, following *Societe Internationale,* the appellate courts have consistently held that before considering the imposition of sanctions or other steps to force violation of foreign law the lower courts should direct parties before them to make all good faith efforts to comply with production requests. The cases cited by the Bahamas, *CAB* v. *Deutsche Lufthansa Aktiengesellschaft,* 591 F.2d 951, 953 (D.C. Cir. 1979), and *SEC* v. *Minas de Artemisa,* 150 F.2d 215, 218 (9th Cir. 1945), impose no such requirement on the lower courts.

Nor does *First National City Bank, supra,* support petitioner's position. There, the Court upheld a district court order freezing a foreign corporation's bank account in a foreign branch of a domestic bank. In its opinion, the Court noted (379 U.S. at 384) that the mere freezing of the account would not violate foreign law. The Court did not state, however, that a violation of foreign law would have required a different result.[12]

2. Petitioner and the Bahamas also contend (Pet. 8-12; Bah. Br. 5, 10) that the decision below conflicts with the decisions of other circuits in two respects. As discussed below, one of the asserted conflicts turns on factual distinctions that do not warrant this Court's review, while the other has no practical significance for this case and its resolution in this case would seriously delay the grand jury's investigation.

a. Petitioner and the Bahamas contend (Pet. 9, 11-12; Bah. Br. 5) that the decision below is in conflict with decisions of other circuits on the enforceability of a subpoena requiring production of information in violation of foreign law. In fact, however, the courts of appeals are all in agreement that this issue should be decided by application of the Restatement's five-factor balancing test. See, *e.g.*, Pet. App. 9a; *United States* v. *First National Bank,* 699 F.2d 341, 345

---

[12]In any event, there would be lesser concerns as to foreign law in the instant case than in that case. There, the order required an act that might be contrary to the foreign country's law to be committed in a foreign jurisdiction, while the order here requires disclosure in this country. The language of the Bahamian statute indicates that bank employees in the Bahamas could transfer records to this country without violating the statute. Section 10(1)(e)(ii) (Pet. App. 2g) permits a bank employee to make a disclosure "for the purpose of the performance of his duties within the scope of his employment." This language suggests that petitioner's employees in the Bahamas would not violate the law if they sent records out of that country in accordance with orders from their superiors in Canada.

(7th Cir. 1983); *United States* v. *Vetco, Inc., supra,* 644 F.2d at 1330; *In re Westinghouse Electric Corp. Uranium Litigation,* 563 F.2d 992, 997 (10th Cir. 1977); *In re Grand Jury Proceedings (Field), supra,* 532 F.2d at 407; *United States* v. *First National City Bank,* 396 F.2d 897, 902 (2d Cir. 1968).

Nevertheless, petitioner contends that the decision below conflicts with that of the Seventh Circuit in *United States* v. *First National Bank, supra.*[13] In that case, arising out of an IRS summons enforcement proceeding seeking information pertaining to the IRS's collection efforts, the court expressly recognized that a foreign bank secrecy law did not automatically bar a domestic court from compelling production of bank records (699 F.2d at 345). It held, however, that under the balancing test of Section 40 of the Restatement, the summons in that case ought not to be enforced (*ibid.*). The court was aware of the decision in the instant case, but it found the two cases to be factually distinguishable on a number of grounds: the court of appeals here had the benefit of findings of fact by the district court, including a finding that petitioner had not made a good faith effort to comply with the subpoena; the information here was sought by a grand jury rather than by the civil tax collector; there

---

[13]The Bahamas further contends (Bah. Br. 4-5) that the decision below also conflicts with decisons of the Second and Tenth Circuits in *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings* v. *Ferguson,* 282 F.2d 149 (2d Cir. 1960); and *In re Westinghouse Electric Corp. Uranium Contracts Litigation, supra.* No conflict exists. The Second Circuit has subsequently receded from its position in *Chase Manhattan Bank* and *Ings* that principles of international comity preclude enforcement of a subpoena that might require the subpoenaed party to violate foreign law. See *United States* v. *First National City Bank, supra,* 396 F.2d at 901-905. In *Westinghouse,* the Tenth Circuit did not hold that foreign law was an absolute bar to the imposition of sanctions. It held only that a balancing of the Restatement's various factors in that case indicated that a contempt order and sanctions were inappropriate (563 F.2d at 999). Moreover, *Westinghouse* involved private litigation rather than grand jury proceedings.

was evidence here, though contested, that all banking transactions for petitioner's Bahamian branch could be handled by the Miami office; Bahamian law here permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and the power of a Bahamian court to permit disclosure did not appear to be as strictly limited as that of a Greek court (699 F.2d at 346-347). Although the government does not agree that all of the factual distinctions advanced by the Seventh Circuit justify the result it reached,[14] it is readily apparent that the two decisions present no legal conflict requiring this Court's resolution.

Petitioner nevertheless relies on the Seventh Circuit's decision for its argument (Pet. 9,11) that a witness must be found to have some purposeful involvement in the subject of an investigation before production of information in violation of foreign law will be ordered. This contention is plainly untenable. First, the Seventh Circuit stated only that the bank's status as a "neutral" party was "significant," not controlling (699 F.2d at 346).[15] Moreover, third party

---

[14]For example, there is no meaningful distinction between the national interest in grand jury investigations and IRS investigations. As this Court recognized in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), the investigative function of the IRS is essentially the same as that of the grand jury. And, of course, the collection of taxes is essential to the financial integrity of this country. *Field, supra*, 532 F.2d at 408.

[15]At any rate, it is hardly clear that petitioner is a completely neutral party. It would be naive indeed to assume that petitioner is not aware that at least some of its American customers may use its Bahamian branch because they desire the protection of the bank secrecy laws. Petitioner's Miami office actively assists customers in the opening of accounts in the Bahamas and transfers customers' funds to Bahamian accounts (July 1982 Tr. 20). It is obviously in petitioner's commercial interest to resist compliance with a grand jury subpoena duces tecum for the production of bank records located in the Bahamas and to advance the position that the bank secrecy laws of that country are an absolute bar to compliance with such a subpoena.

witnesses *have* been held in contempt for failure to produce documents and to testify even though they have argued that production or testimony would violate foreign law. Thus, in *Vetco, supra,* the Ninth Circuit upheld contempt penalties against a third party accounting firm, notwithstanding the firm's claim that production of documents would violate Swiss law. Similarly, in *Field, supra,* the Fifth Circuit upheld contempt penalties imposed on an officer of a foreign bank, despite his assertion that compliance with the subpoena would subject him to criminal penalties under the bank secrecy law of the Cayman Islands. As this Court has noted, "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes,* 408 U.S. 665, 701 (1972), quoting *United States* v. *Stone,* 429 F.2d 138, 140 (2d Cir. 1970). And the scope of a grand jury's inquiry is not to be limited by forecasts of the probable result of the investigation or by doubts whether any particular individual will be accused of crime. *United States* v. *Calandra, supra,* 414 U.S. at 343; *Blair* v. *United States,* 250 U.S. 273, 282 (1919). Thus, a witness's involvement in the matter under grand jury investigation is immaterial.

b. Petitioner also contends that this Court should resolve the conflict between the decision below and that of the Third Circuit in *In re Grand Jury Proceedings (Schofield I),* 486 F.2d 85 (1973). In *Schofield I,* the court invoked its supervisory authority to require the government in a subpoena enforcement proceeding "to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose" (*id.* at 93). The court recognized that this Court had held in *United States* v. *Dionisio,* 410 U.S. 1 (1973), and *United States* v. *Mara,* 410 U.S. 19 (1973), that

the Fourth Amendment did not require such a showing (486 F.2d at 89). In this case, the Eleventh Circuit, following Fifth Circuit precedent (*In re Grand Jury Investigation (McLean)*, 565 F.2d 318 (5th Cir. 1977)), rejected the *Schofield I* rule. The First, Second,[16] Eighth, and Ninth Circuits also have rejected the rule, while the Tenth Circuit has cited it without discussion. *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78, 82-83 (2d Cir. 1978); *In re Grand Jury Proceedings (Universal Mfg. Co.)*, 508 F.2d 684, 686 n.2 (8th Cir. 1975);[17] *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 281 (10th Cir. 1983).[18]

In our view, the Third Circuit's (and, arguably, the Tenth Circuit's) decision to exercise a greater degree of supervisory power over the conduct of grand jury proceedings in the manner described — while unjustified — does not require this Court's review in the instant case. As the Third Circuit recognized, its *Schofield* rule is not constitutionally

---

[16]Petitioner asserts (Pet. 10-11) that in *United States* v. *First National City Bank*, *supra*, 396 F.2d at 901, the Second Circuit, while affirming an order requiring a bank to comply with a grand jury subpoena for records in Germany, in violation of German civil law, considered the significance of the documents sought. The court did address the importance of the subject matter of the grand jury investigation (*id.* at 902-903), but nothing in its opinion suggests that its decision turned on a showing by the government of the relevance of the subpoenaed documents to the investigation. In any event, the Second Circuit unequivocally rejected the *Schofield I* rule in *In re Liberatore*, 574 F.2d 78, 82-83 (1978).

[17]The Eighth Circuit declined to adopt the *Schofield I* rule in the cited case, but noted that the government had filed an affidavit substantially meeting the requirements of the rule.

[18]The Bahamas relies (Bah. Br. 10) on a number of additional cases for the proposition that a showing of relevancy was required here. One of these decisions, *In re Special Grand Jury No. 81-1*, 676 F.2d 1005 (1981), was withdrawn by the court (697 F.2d 112 (4th Cir. 1982)). The remaining cases do not involve grand juries and are therefore inapposite.

required. It is not essential that every circuit exercise its supervisory powers in a uniform manner, and thus this Court need not reconcile this particular conflict. This is particularly true here because in *Schofield II (In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975)), the Third Circuit, while adhering to its *Schofield I* rule, made it clear that the showing it will require of the government is minimal.[19]

Thus, even if this case had been litigated in a circuit following the *Schofield* rule, petitioner would not have received any significant information of which it is not already aware. The government has disclosed in this case that the grand jury is conducting a tax and narcotics investigation (R. 3-4; Jan. 1982 Tr. 4). Banking records are essential to a complete tracing of funds and are therefore unquestionably relevant to a tax investigation. Moreover, petitioner has never even suggested that the instant subpoena was issued for an improper purpose. Thus, it is difficult to see how petitioner's position would be aided by the formal filing of an affidavit reciting these same facts.[20]

Finally, review of this particular conflict among the circuits should not be undertaken in this case. The contested

---

[19]The court accepted as sufficient a two-paragraph affidavit stating that the grand jury was investigating various violations of federal criminal statutes, including those proscribing perjury and the giving of false declarations; that Schofield had been advised that she was a potential defendant; that it was essential and necessary to the grand jury investigation that Schofield furnish handwriting exemplars and fingerprints; and that the evidence sought would be used solely as a standard of comparison to determine whether or not the witness uttered any forged, falsely made, altered or counterfeited checks (507 F.2d at 966-967).

[20]The government did in fact file a *Schofield*-type affidavit in this case for the district court's in camera inspection. The affidavit was filed under seal and was not relied upon by the district court or the court of appeals (Pet. App. 4a n.3).

grand jury subpoena was issued in September 1981, and to date the grand jury has not been provided with the material it has requested. Further judicial review would confront the grand jury with the imminent running of the statute of limitations as to some of the narcotics offenses under investigation, and the grand jury would have to decide whether to indict without the benefit of all relevant evidence. Review in this case would thus contravene the principles that unnecessary interference with grand jury investigations is to be avoided and that a presumption of regularity attaches to grand jury proceedings. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974); *United States* v. *Calandra*, *supra*, 414 U.S. at 345; *United States* v. *Dionisio*, *supra*, 410 U.S. at 17.

3. The Bahamas also argues (Bah. Br. 11-13) that the courts below should have required the government to seek production through the Bahamian courts. But the government is not required to seek production of documents through an alternative means that is not substantially equivalent to a grand jury subpoena. *United States* v. *Vetco, Inc.*, *supra*, 644 F.2d at 1332-1333. Nor is the government required to make a showing that information sought by grand jury subpoena is not available through some other means. *United States* v. *Mara*, *supra*, 410 U.S. at 21; *United States* v. *Dionisio*, *supra*, 410 U.S. at 17 n.16; *In re Liberatore*, *supra*, 574 F.2d at 83. Thus, at the least, the burden was on petitioner to show that seeking production through the Bahamian courts was equivalent to use of a grand jury subpoena. Petitioner failed to meet that burden. The evidence offered by petitioner itself showed that the Bahamian courts will not order production where the criminal activity under investigation is a crime only under the tax laws of the United States. While the grand jury's investigation in part concerns narcotics offenses, in light of the obvious relevance of the information sought here to a tax

investigation, a Bahamian court might well conclude that the information related only to the tax aspects of the investigation and deny a request for judicial assistance. Nor has the Commonwealth of the Bahamas offered anything to allay this concern. Moreover, the government showed that seeking assistance from the Bahamas could be unduly time consuming and costly.[21] Given these and other circumstances in this case,[22] the courts below were clearly correct in refusing to require the government to seek assistance from the Bahamian courts.

4. Finally, petitioner's position here is contrary to pronouncements of this Court concerning the duty to give evidence before the grand jury. See, *e.g., United States* v. *Calandra, supra,* 414 U.S. at 345; *United States* v. *Dionisio, supra,* 410 U.S. at 9-10; *Piemonte* v. *United States,* 367 U.S. 556, 559 n.2 (1961); *Blair* v. *United States, supra,* 250

---

[21]The Bahamas' reliance (Bah. Br. 13) on *Upjohn Co.* v. *United States,* 449 U.S. 383 (1981), in an effort to minimize the significance of this factor, is misplaced. In *Upjohn,* this Court stated that considerations of the government's convenience did not overcome the policies served by the attorney-client privilege (449 U.S. at 396). Here, no recognized domestic policies are served by affording an American citizen a right of privacy in bank records that exceeds the right of privacy recognized in this country. Nor is there any policy reason to accord the American citizen a right to have disclosure ordered only by a Bahamian court; from the bank customer's perspective, there is no material difference between disclosure ordered by such a court and disclosure ordered by an American court.

[22]It is noteworthy that the Bahamas has demonstrated no legitimate interest in restricting the grand jury's access to information concerning an American's domestic tax obligations. Any interest of the Bahamas in enabling an American to use Bahamian banks to obstruct a federal grand jury by depriving it of access to otherwise unprivileged information relating to possible violations of American law is hardly a national interest to which a court of this country should defer. The Bahamas' interest is clearly outweighed when balanced against the American interest in unfettered grand jury investigations and the collection of taxes.

U.S. at 281. These cases make it clear that hardship on a witness does not excuse him from his obligation to provide evidence.[23] Even a well-founded fear for personal safety is not a legal excuse for failure to give evidence. *Piemonte* v. *United States, supra,* 367 U.S. at 559 n.2. It follows that the possibility that petitioner might be subject to criminal sanctions in another country did not preclude enforcement of the instant subpoena.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
CHARLES E. BROOKHART
ALAN HECHTKOPF
Attorneys

MAY 1983

---

[23] In *Blair* v. *United States, supra,* 250 U.S. at 281, the Court stated, "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." The Court also observed that while the duty to give evidence may be "onerous" at times, it is "necessary to the administration of justice" (*ibid.*). In *United States* v. *Calandra, supra,* 414 U.S. at 345, the Court declared, "[t]he duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' interest in privacy must yield to the public's overriding interest in full disclosure."